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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND M. W. MILLER, TRUSTEE, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on August 2, 1955, denying enforcement of an order issued by the Board against respondents.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 17-30) is not yet reported. The findings

of fact, conclusions of law and order of the Board (R. 50-61) [1] are reported at 109 NLRB 275.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 30-31) was entered on August 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. at 147, 29 U.S.C. 160(e).

QUESTION PRESENTED

In the course of a labor dispute the union picketed the employer at his warehouse where the employees involved in the dispute were employed and also at three construction projects, several miles distant, where the employer was engaged as a subcontractor and employed various craftsmen entirely unconnected with the dispute. As a consequence of the picketing at the construction projects, employees of other contractors on these projects ceased work on several occasions. The question presented is whether the Board properly held that, in these circumstances, the picketing at the construction projects, although ostensibly directed against the primary employer, nevertheless constituted inducement of the employees of the other contractors to engage in work stoppages with an object of forcing such other contractors to cease

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[1] The reference "R." designates the Transcript of Record in the court of appeals, to which has been added the proceedings in the court below; "B.A.," the Appendix to the brief of the Board filed in the court below.

doing business with the primary employer, in violation of Section 8(b)(4)(A) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 31-32.

STATEMENT

1. *The facts.*—Upon the usual proceedings under Section 10 of the Act, the Board, on July 22, 1954, issued its findings of fact, conclusions of law, and order (R. 50-61). Briefly, the Board found that respondents, in violation of Section 8(b)(4)(A) of the Act, induced and encouraged the employees of certain contractors to engage in a strike or concerted refusal, in the course of their employment, to perform services for their employers, one object thereof being to force and require the contractors to cease doing business with Otis Massey Company, Ltd., the charging party. The Board's subsidiary findings which are substantially undisputed may be summarized as follows:[2]

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[2] In the proceeding before the Board, respondents and the General Counsel waived the right to a hearing before a trial examiner, stipulating that the Board render its decision on evidence previously adduced in a proceeding for injunctive relief instituted against respondents on February 8, 1954, under Section 10(l) of the Act in the United States District Court for the Southern District of Texas, Houston Division (R. 51-52, 44-50; B.A. 2-73). On May 7, 1954, the District Court issued an injunction barring the Union from engaging in the picketing here involved pending final determination of the issue by the Board. 123 F. Supp. 125.

Otis Massey is engaged in Houston, Texas, in the distribution and installation of insulation and other building materials (R. 52; B.A. 5-6). It operates a warehouse in connection with which it employs four truck drivers and warehousemen for whom respondent union is the certified bargaining representative (R. 53; B.A. 10-12). A dispute having arisen over the terms of a contract applicable to these four employees, the Union on January 13, 1954, went on strike and picketed the warehouse (R. 53; B.A. 10-11).

Simultaneously with the picketing at the warehouse, the Union began to picket three large construction projects (located several miles from the warehouse) where Massey was engaged as a subcontractor (R. 53-54, 28, 37; B.A. 6, 8-9, 13, 27-28, 39-40). At two of these sites, St. Luke's Hospital and the University of Texas Dental Clinic, Otis Massey was a subcontractor of the mechanical subcontractor, C. Wallace Plumbing Company, which in turn was a subcontractor of the general contractors, Tellespen Construction Company and Manhattan Construction Company, respectively (R. 54; B.A. 8-9). At the third construction job, Battlestein's Service Center, Otis Massey was the subcontractor of the general contractor, O'Rourke Construction Company (R. 54; B.A. 9). At each of these projects Otis Massey employed various groups of craftsmen such as asbestos workers, carpenters, and flooring men, all represented by unions other than respondent Union (R. 53; B.A. 7-8, 15). There was no dispute between Otis Massey and this

or any other union with respect to the construction employees. These employees rarely go to the warehouse (B.A. 6). The company's truck drivers and warehousemen go to the construction projects occasionally to deliver building materials (R. 54; B.A. 20-22).

Prior to the picketing, the Union had requested permission from the general constractors at the projects to enter upon the premises and picket directly adjacent to the places where the craftsmen of Otis Massey were stationed (R. 54, 46; B.A. 43-46, 72). Permission was refused on the ground that the contractors did not own the property and were therefore not in a position to grant permission (R. 54; B.A. 45-46).

The pickets, both at the warehouse and the construction projects, carried signs which read, "General Drivers Local 968, AFL, On Strike Against Otis Massey" (R. 54; B.A. 11, 15, 23, 39). Except on one or two occasions, no truck drivers or warehousemen of Massey were at or near the construction sites when the picketing occurred; on the other hand, the Otis Massey craftsmen, as to whom there was no dispute, were present on every occasion (R. 54; B.A. 20-21, 37, 41-42, 56-58, 60-61). On one occasion the superintendent of one of the projects asked the Union's business agent if all of the employees on the project would be "involved" and the latter answered, "No, it was strictly against Otis Massey" (B.A. 28-29). When the superintendent then asked if the picketing would stop if

the Otis Massey insulators went home, the business agent replied that it would (*ibid.*).

The picketing at the construction projects was carried on from time to time until February 11, 1954, when it ceased as the result of the injunction proceeding referred to above, p. 3, n. 2 (B.A. 65-66, 67-70). On January 27 and 29, as a consequence of the picketing, the various craftsmen working for the neutral contractors, as well as for Otis Massey, walked off the job at the dental clinic and hospital sites (B.A. 28-31, 40). On the 27th, the electricians left the dental clinic job but returned after Otis Massey's insulators had left (B.A. 30). On the same day all work at the hospital job ceased for the rest of the day when all crafts except the cement finishers quit work (B.A. 40).

On February 11, the day before the hearing in the injunction proceeding, a notation reading "See our pamphlet" was added to the picket signs (R. 46; B.A. 59, 60). The pamphlet or handbill, which was distributed by the pickets, stated that the Union's dispute was with Otis Massey only and not with any other employer working on the project, that the Union had been refused permission to place pickets within the project adjacent to the locations where Otis Massey craftsmen were working, and requested the recipient to consider the picket line as if it were so located (R. 39, 46; B.A. 60, 73).

2. *The Board's decision and order.*—Upon the facts summarized above, the Board concluded (R. 56) that by picketing the construction projects

described above the Union, in violation of Section 8(b)(4)(A), induced employees of the neutral employers on the projects to cease work as a means of compelling these employers to discontinue doing business with Otis Massey. Rejecting the contention that the picketing was lawful primary action, the Board stated (R. 55-56):

> The Board, with court approval, has held that Section 8(b)(4)(A) forbids secondary, but not primary, activity at the common premises of neutral employers and an employer with which the union is engaged in a labor dispute. The problem in all of these cases, however, has been the difficult one of distinguishing primary from secondary conduct. In the instant case the Union contends that its conduct in picketing the construction projects was primary within the meaning of the criteria set forth in the *Moore Drydock* case [92 NLRB 547]. The Union points out that its picket sign clearly identified Otis Massey as the primary employer and that its pickets were reasonably close to the work locations of Otis Massey employees. While these facts would otherwise be most important in determining the legality of the Union's conduct, the record in this case reveals, as indicated above, that the employees solely involved in the dispute between the Union and Otis Massey were employed not at the construction projects but at the Otis Massey warehouse. The *Moore Drydock* and other common situs cases make

> it clear that picketing affecting in any manner the employees of such secondary employers can be considered primary only where, as the first condition precedent, the secondary employer "is harboring the situs of a dispute between a union and a primary employer." This is perhaps the most fundamental requirement in achieving a fair balance between the right of a union to publicize its labor dispute and the right of neutral employers to be free from controversies not their own. It is clear in the instant case that the *situs* of the Union's dispute with Otis Massey was the Otis Massey Warehouse, and that the Union could adequately publicize that dispute by limiting its picketing activities to that location. [Footnotes omitted].

The Board directed respondents to cease and desist from inducing or encouraging employees of C. Wallace Plumbing Company, O'Rourke Construction Company, Tellepsen Construction Company, Manhattan Construction Company, or of any other employer to engage in a strike or concerted refusal in the course of their employment to perform services for their employers where an object thereof is to force or require said employers to cease doing business with Otis Massey (R. 58-59).

3. *The Court of Appeals decision.*—The court below (*infra*, pp. 17, 24-27), while recognizing that the Board's *Moore Drydock* criteria represent "a

commendable effort" to strike a balance between permissible primary action and proscribed secondary action at a common work site, where both the primary and neutral employers are present, nevertheless concluded that "there was no warrant in the language of the statute or the authorities cited * * * for empowering the Board, under guise of fact finding, to fix the 'situs' of a dispute at only one of a primary employer's numerous business activities, thereby isolating other employees of that same primary employer from exercising their statutory right under Section 7 to engage in mutual aid and protection and make common cause with their co-workers."

Peaceful picketing at such a common site, the court further held (*infra*, p. 28), is lawful under the Act so long as it is "directed solely against the primary employer with whom a labor dispute exists" and "any adverse effect upon secondary, neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right." Turning to the facts of the instant case and noting, *inter alia*, that the union by its picket sign, pamphlet and statements had indicated that the picketing was limited to Otis Massey, that the pickets had located themselves as close as possible to the place where the Otis Massey craftsmen were engaged in their employer's normal business, and that after the Union distributed its pamphlet, only Otis Massey employees honored the picket line, the court found that "the picketing here enjoined was aimed only at the primary employer, Otis

Massey, and [was] wholly without the proscribed secondary object" (*infra*, pp. 28-30).

REASONS FOR GRANTING THE WRIT

1. Section 8(b)(4)(A), as this Court has recognized, represents a practical compromise between "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. Giving effect to this compromise and drawing the line between permissible primary action and proscribed secondary action has posed, since the passage of the amended Act in 1947, a particularly difficult and recurring problem in situations where the primary and secondary employers are engaged in work at a common site. The question has been of especial significance in the construction industry where the work on a building project is commonly performed by general contractors and subcontractors, several of whom are at the same time engaged in work at the job. When a labor organization, engaged in a dispute with one of the contractors on the job, pickets at such a site to publicize its dispute and enlist support, the crucial problem arises where to draw the line, consistent with the dual Congressional objectives, between permissible primary action and illegal secondary action. The line which the Board has marked out between them in con-

struing Section 8(b)(4)(A) was described in *Moore Drydock Company (Saiiors' Union of the Pacific),* 92 NLRB 547, where the Board stated (at p. 549):

> When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. [Footnotes omitted.]

The construction which the Board has thus given to Section 8(b)(4)(A) as it applies to common site picketing has been generally viewed by the courts of appeals which have dealt with the problem as "a sound interpretation of the Act." *National Labor Relations Board* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C.A. 2); *Piezonki* v.

National Labor Relations Board, 219 F. 2d 879, 883 (C.A. 4); *National Labor Relations Board* v. *Chauffeurs, Teamsters, etc.,* 212 F. 2d 216, 219 (C.A. 7); *National Labor Relations Board* v. *Local Union No. 55, etc.,* 218 F. 2d 226, 231 (C.A. 10).

Consistent with the foregoing interpretation of the Act, the Board concluded in the instant case that the picketing of the construction projects was forbidden secondary action because these projects were not the geographic *situs* of the labor dispute between Otis Massey and the union—a prerequisite which, in the Board's view (R. 56), is "perhaps the most fundamental requirement in achieving a fair balance between the right of a union to publicize its labor dispute and the right of neutral employers to be free from controversies not their own." The court below has rejected the accomodation which the Board has thus made between these competing interests. It holds that, without regard to the "situs of the dispute," a union may follow the primary employer to a site occupied by him together with neutral employers and publicize its dispute and seek to enlist support so long as the picketing is "aimed solely at the primary employer."

2. Concededly, the question presented admits of no easy answer. To regard as primary and lawful all picketing which occurs at premises shared, as here, by the primary and neutral employers would grant an unwarranted exemption from the statutory ban, merely because of the fortuitous geo-

graphic factor. On the other hand, to regard all such picketing as secondary would result in banning picketing of the primary employer merely because he occupies the same geographic site with a neutral employer. In the Board's view, a fair balance between these two courses is achieved by permitting picketing of the primary employer at a common site only if that site is also the geographic location of the dispute between the employer and the employees who are involved in it. *Brotherhood of Painters, etc. Union (Pittsburgh Plate Glass Co.)*, 110 NLRB 455. The balance thus struck, the Board believes, is reasonably calculated to effectuate in a practical manner the dual Congressional objectives, *i. e.*, to shield neutral employers from involvement in quarrels not their own and to preserve the right of labor organizations to bring effective economic pressure to bear upon primary employers.

Extension of the picket line to a common site, as here, inevitably tends to draw into the dispute neutral employers and their employees. "The reluctance of workers to cross a picket line is notorious." *Printing Specialties & Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). Effectuation of the Congressional purpose to shield innocent third persons from conscription into disputes not their own necessarily requires that normally, in the absence of some overriding justification, picketing be confined wherever possible to the separate premises of the primary em-

ployer.[3] Where a common site, shared by the primary and neutral employers, is the geographic location of the dispute, due regard for the right of the union to picket effectively, both from the standpoint of the general public and the particular employees involved in the dispute, furnishes sufficient justification for permitting picketing of the primary employer at that location and any involvement of neutral employers and their employees may appropriately be viewed as no more than an incidental consequence of lawful primary action.

But where, as here, the common site does not, as the Board found, harbor the situs of the dispute, and the primary employer's employees engaged in work there are in no way involved in the labor dispute, there is less justification for carving an exemption in the blanket prohibition of the statute against secondary strike pressures. The union may publicize its dispute at the separate premises of the primary employer or any geographical area where the dispute is located. The only basis for allowing the picketing to be extended to any other site is the impermissible one of increasing its effectiveness by reaching the employees of neutral employers. Necessarily, the detriment which the

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[3] See *Brewery and Beverage Drivers, Etc. (Washington Coca-Cola)*, 107 NLRB 299, enforced, 220 F. 2d 380 (C.A. D.C.); *Oil Workers Int'l Union (The Pure Oil Co.)*, 84 NLRB 315; *United Electrical, Radio and Machine Workers of America (Ryan Construction Corp)*, 85 NLRB 417; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 649 (C.A. D.C.), certiorari denied, 342 U.S. 869.

union may incur as a consequence of prohibiting picketing at a common site must be weighed against the public interest in effectuating the statutory policy against the conscription of neutrals which almost inevitably follows picketing in that area. Weighing these factors, the Board may appropriately subordinate the union's right to bring pressure to bear on the primary employer to the public interest in shielding neutral employers from pressures in controversies not their own. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it seems that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." (*Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 611, quoting from Mr. Justice Holmes, dissenting, in *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 41.)

3. As already suggested, the question presented is an important one in the administration of Section 8(b)(4)(A), particularly as it affects the building construction industry where working arrangements similar to those here are common practice. In *Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, this Court undertook to resolve the question whether picketing directed against an entire common construction project where the primary employer and neutral employers were engaged in work exceeded the permissible

limits of lawful primary action even though the common site was the geographical location of the dispute. The instant case presents a significant variant of that question, namely, whether picketing ostensibly limited to the primary employer and his employees but conducted at a common site which is not the geographical location of the dispute is violative of Section 8(b)(4)(A). Review by this Court in obtaining resolution of that question is as necessary as it was in resolving the related issue in the *Electrical Workers* case.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

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DAVID P. FINDLING,
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National Labor Relations Board.

OCTOBER 1955.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15305

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND M. W. MILLER, TRUSTEE, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, RESPONDENTS

Petition for the Enforcement of an Order of The National Labor Relations Board, sitting at Washington, D. C.

(August 2, 1955)

Before RIVES, Circuit Judge, and DAWKINS and DE VANE, District Judges.

RIVES, Circuit Judge: The Board petitions for enforcement of its order issued against respondents on July 22, 1954, based on findings that respondent union and its trustee individually had violated Section 8(b)(4)(A) [29 U.S.C.A. 158(b)(4)(A)] through inducing the employees of certain neutral employers, by means of picketing certain construction projects, to strike in order to force those neutral employers to cease doing busi-

ness with the Otis Massey Company, the charging party and primary employer with whom the union's dispute arose. The Board's decision and order are reported at 109 N.L.R.B. 61.

The material facts found by the Board [1] reveal that the Otis Massey Company is a co-partnership engaged at Houston, Texas, in the distribution and installation of insulation and other building materials; that in January, 1954, it was acting as subcontractor in the installation of certain materials at St. Luke's Hospital, the University of Texas Dental Clinic and Battlestein's Service Center, which three buildings were then undergoing construction at various locations in Houston; that at the first two building locations aforementioned, Otis Massey was a subcontractor of C. Wallace Plumbing Co., which company was in turn a subcontractor of the general contractors, Tellepsen Construction Company and Manhattan Construction Company, and at the last mentioned construction site. Otis Massey was acting as subcontractor for the general contractor, O'Rourke Construction Company; that Massey employed at all three loca-

[1] The parties by stipulation, with Board approval, waived the right to a hearing before a trial examiner, and agreed for the Board to render its decision based upon certain stipulated facts, the pleadings, and the testimony and exhibits in an injunction proceeding which had previously been brought on February 8, 1954, by the Regional Director under Sec. 10[l] of the Act in the United States District Court at Houston, Texas. That proceeding resulted in an injunction barring respondent union from engaging in the picketing activities hereinafter described pending final determination by the Board of its legality. See Elliott v. General Drivers, etc., 123 F. Supp. 123, 130.

tions various craftsmen, among which were asbestos workers, carpenters and flooring men, all of which were represented in collective bargaining with Otis Massey by their particular craft unions, and none of which were represented by the respondent union.

It was further found that Otis Massey also operates a warehouse located several miles from each of the above construction projects, where it employs four truck drivers and warehousemen for whom the respondent union is the certified bargaining representative; that these four employees occasionally deliver building materials to the construction projects, but otherwise have no duties at the building locations; that in January, 1954, a dispute arose between Otis Massey and the respondent union concerning the terms of a bargaining contract applicable only to the four truck drivers and warehousemen, as a result of which the respondent union called a strike on January 13 and commenced picketing the warehouse; that no dispute existed between Otis Massey and respondent or any other union with respect to the various craftsmen employed by it at the three construction projects, but the union nevertheless commenced picketing the construction projects at the same time it began picketing the warehouse;[2] that, except in one or

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[2] Respondent union had previously requested permission from the general contractors at the hospital and dental clinic jobs to picket the premises nearest the location where the Otis Massey workers were stationed, but this permission was refused on the theory that the contractors did not own the property and were, therefore, in no position to grant the privi-

two instances, none of the truck drivers or warehousemen here involved were making deliveries at the construction sites when the picketing occurred, though the various other craftsmen were present and engaged in construction duties on every occasion; that the picketing continued until February 11, 1954, when it ceased as a result of the injunction proceeding mentioned above (footnote 1, *supra*), and on January 27th and 29th, the various craftsmen working for the neutral contractors, as well as those employed by Otis Massey, engaged in a concerted walk-out from the dental clinic and hospital construction jobs as a result of the picketing; that on January 27 a number of electricians also left the dental clinic job but subsequently returned after the

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lege. The union's letter requesting such permission at the dental clinic construction site (Respondent's Exhibit 1) reads as follows:

"Gentlemen:

"Otis Massey Company, Ltd., has been engaged in its normal business at the Texas Dental College job, for which you are general contractor, for some period of time and is presently engaged in doing some insulation work.

"The area where Otis Massey Company Ltd. is now engaged in this work is within premises controlled by your company, and it is our desire to picket right at the sites of the dispute and as close to the actual operations of Otis Massey, Ltd. as possible.

"As is clearly stated on our picket signs, the dispute is with Otis Massey Company, Ltd. and with no one else.

"We, therefore, request that you permit our pickets to come within the premises generally controlled by you and picket directly adjacent to the place where Otis Massey Company, Ltd. employees are now working.

"Yours truly,
"R. G. Miller, Secy-Treas.
"Local Union No. 968"

Otis Massey insulators left, and on that same day a work stoppage at the hospital construction site occurred when all craftsmen except the cement finishers quit work.

It is undisputed, however, that the pickets at the construction projects carried signs reading: "General Drivers, Local 968, AFL On Strike Against Otis Massey"; that on February 11, the day before the hearing in the aforementioned district court injunction proceeding (footnote 1, *supra*), a notation to "See our pamphlet" was added to the picket signs, and the pamphlet or handbill referred to, which was distributed by the pickets expressly advised any interested parties that the respondent union's dispute was with Otis Massey only, and not with any other employer engaged in construction work at the projects, and that the picket line should be considered as directed only toward those locations within the projects where the Otis Massey craftsmen were working.[3]

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[3] Specifically, this pamphlet or handbill (Respondent's Exhibit 2) reads as follows:

"NOTICE

"General Drivers Local Union 968, is on strike against Otis Massey Company, Ltd.

"The Union asked permission to place pickets within these premsies and adjacent to the place where Massey employees are now working, but we have not been permitted to do so. If we are permitted to do so, we will move these pickets and place them right at the actual operations of Otis Massey within these premises. In the meantime, please consider this picket line as if it were only around the limited area where Otis Massey is engaged in these premises.

"Our dispute is with Otis Massey Company, Ltd. and not with any other employer working within this building site or area."

The Board concluded from the above summarized facts that the union's activity in picketing the construction projects violated Section 8(b)(4)(A) of the Act, because it was conducted, "at least in part," to force the secondary and neutral employers "to cease doing business with Otis Massey, by inducing and encouraging the employees of said employers to engage in a strike." That ultimate conclusion was predicated mainly upon findings, vigorously attacked here, that the drivers and warehousemen involved were employed "not at the construction projects but at the Otis Massey warehouse," so that the warehouse location was the sole "situs of the union's dispute," and the place where it could "adequately publicize" its private controversy with Massey without disrupting work of the other neutral employers. In reaching its ultimate conclusion that the union's activity was secondary and unlawful, rather than primary and lawful under the Act, the Board relied strongly on the union's supposed failure to justify its picketing at the common premises as "harboring the situs of a dispute between a union and a primary employer" under its Moore Dry Dock Co. case, 92 N. L. R. B. 547.[4]

Respondents insist the Board's findings, that the warehouse was the sole situs of the dispute and that the picketing was for an unlawful object, are not supported by that substantial evidence on the

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[4] The Board, in its cease and desist order, enjoined both the union and the individual respondent, its trustee M. W. Miller, from further unlawful secondary activity of the nature found.

record considered as a whole here required for enforcement of its order;[5] that the Board is without authority, statutory or otherwise, arbitrarily to make such findings in disregard of contrary, undisputed testimony that the construction sites were among several locations at which Otis Massey conducted its normal business activities, and that the picketing of those sites was justifiably directed solely against that company as the primary employer; and, finally, that the Board's order, under the facts proven, violates respondents' right of free speech, contrary to the First Amendment and is especially unjustified insofar as it purports to hold the individual respondent, Trustee Miller, personally responsible for the alleged 8(b)(4)(A) violation.

Section 8(b)(4)(A) of the Act, insofar as here material, makes it an unfair labor practice for a labor union or its agents to induce or encourage a strike by neutral employees "where an object thereof" is to force or require any neutral employer "to cease doing business with any other person." That section was enacted to outlaw secondary boycotts, and has been construed as proscribing secondary, concerted activity at the common premises of neutral employers and an employer with whom a union has a labor dispute,[6] though it does not prohibit a union from taking appropriate concerted action against a primary

[5] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.

[6] N.L.R.B. v. Denver Building Trades Council, 341 U.S. 675, 686.

employer whose employees it represents for collective bargaining purposes.[7] As the Board recognized, the crucial problem in these cases, where both the primary and neutral employers occupy a common work site, is in distinguishing between "permissible primary action and proscribed secondary action." See *N. L. R. B. v. Local Union No. 55 etc.*, 10th Cir., 218 F. 2d 226, 231. In a commendable effort to balance "the dual congressional objectives of preserving the right of labor organizations to bring pressures to bear on offending employers in primary disputes and of shielding unoffending employers and others from pressures in controversies not their own,"[8] the Board, in its Moore Dry Dock Company case, *supra*, has devised certain evidentiary tests to aid in determining the ultimate issue of whether common-situs picketing is primary and lawful or secondary and unlawful.[9] Cf. *Commissioner v. Culbertson*, 337 U. S. 733, 741.

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[7] N.L.R.B. v. International Rice Milling Co., Inc., 341 U.S. 665, 671.

[8] N.L.R.B. v. Denver Building Trades Council, supra n. 6, at p. 692.

[9] In that decision, the Board held that common-situs picketing, in order to qualify as primary and lawful, must meet all four of the following conditions:

"(a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises;

"(b) at the time of the picketing the primary employer is engaged in its normal business at the situs;

"(c) the picketing is limited to places reasonably close to the location of the situs; and

"(d) the picketing discloses clearly that the dispute is with the primary employer." 92 N.L.R.B. 547, 549.

And while four circuits have approved the criteria evolved by the Board in its Moore Dry Dock case, *supra*,[10] we think such approval was necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be effectually supplanted merely by Board findings that the real "situs" of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be "adequately" publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists.[11] Indeed, such a theory would, we think, elevate the Board formulated "criteria" by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawful-

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[10] N.L.R.B. v. Service Trade Chauffeurs, etc., 2nd Cir., 191 F. 2d. 65, 68; Piezonki v. N.L.R.B., 4th Cir., 219 F. 2d. 879, 883; N.L.R.B. v. Chauffeurs, Teamsters, etc. 7th Cir. 212 F. 2d. 216, 219; N.L.R.B. v. Local Union No. 55, 10th Cir., 218 F. 2d. 226, 231.

[11] That this statement fairly summarizes the Board's position is evidenced by the following argument taken from its brief:

"Since, as we have seen, the warehouse and not the construction projects was the situs of the dispute and since the Union could adequately publicize its dispute by picketing the warehouse, the Board *properly inferred* that at least one of the objects of the picketing at the projects was to force the various neutral contractors to cease doing business with Otis Massey by inducing or encouraging their employees to go on strike." (Emphasis ours.)

ness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is "the objective of the union's secondary activities * * * and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." *Electrical Workers v. Labor Board,* 341 U. S. 694, 704. *Labor Board v. Rice Milling Co., supra* at p. 672. While our view does not compel rejection of all of the Moore Dry Dock criteria, as such, when properly applied, it does expressly limit the applicability of that decision as controlling under the facts of this case, for we conclude that no warrant exists either in the language of the statute or the authorities cited which would justify the adoption and approval of its "situs" theory to an extent inconsistent with other provisions of the Act,[12] or for

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[12] A recently enacted Section 13 of the Act provides that:

"Nothing in this (Act), except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C.A. 163.

Moreover, in its Rice Milling Co. case, supra, the Supreme Court construed Section 13 as follows:

"By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the

empowering the Board, under guise of fact-finding, to fix the "situs" of a dispute at only one of a primary employer's numerous business activities,[13] thereby isolating other employees of that same primary employer from exercising their statutory right under Section 7 to engage in mutual aid and protection and make common cause with their co-workers. See *Carter Carburetor Corp. v. N. L. R. B.*, 8th Cir., 140 F. 2d 714, 718; *N. L. R. B. v. Peter C. K. Swiss Choc. Co.*, 2nd Cir., 130 F. 2d 503, 505; *N. L. R. B. v. J. I. Case Co., etc.*, 8th Cir., 198 F. 2d 919, 922. Unless the truck drivers and warehousemen, only four in number, could persuade the other employees of Otis Massey to decline to do their employer's installation work until the strike was settled, it is obvious that the strike was foredoomed to failure from its inception, for picketing only at the warehouse "situs" where such other

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Act. No such specific provision in § 8(b)(4) reaches the incident here. The material legislative history supports this view." 341 U.S. 665, at p. 673.

[13] If this factual issue be viewed as controlling, it should be noted that one of the Otis Massey business partners, J. V. Castle, conceded in his testimony that "probably seventy per cent or better" of the Company's business activities consisted of "job site work", rather than warehouse operations, and the record shows that the truck driver-warehousemen, during the period here material, did make a number of deliveries to the Otis Massey job sites, as evidenced by the Government's concession as follows:

"THE COURT: You are simply trying to prove from time to time during the course of this work these truck drivers and warehousemen make deliveries out there for the Massey Company? I am sure the Government doesn't dispute that.

"MR. HENDERSON: No, sir. We will certainly concede that."

employees almost never came was but a useless and futile gesture.

Irrespective of the Board formulated "situs" theory, however, we think such peaceful picketing upon common premises, directed solely against the primary employer with whom a labor dispute exists, is still lawful under the Act, and that any adverse effect upon secondary, neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right. *Labor Board* v. *Rice Milling Co., supra;* cf. *N.L.R.B.* v. *Chauffeurs, Teamsters, etc., supra; N.L.R.B.* v. *Local Union No. 55, supra.* That the picketing here enjoined was aimed only at the primary employer, Otis Massey, and wholly without the proscribed secondary object, could hardly be disputed under this record. It is significantly devoid of any probative proof in support of the allegations in the complaint [14] that respondent by "picketing,* orders, instructions, directions, appeals and other means" induced and encouraged employees of the neutral employers to strike with unlawful secondary object, except for the peaceful picketing heretofore mentioned, and even under the Board's own evidence that concerted activity was solely for the lawful object of picketing only Otis Massey "right *at the sites of the dispute* and as close to the actual operations of Otis Massey * * * as possible," as

[14] Of some further significance is the fact that this complaint was brought at the instance of the primary employer and charging party, Otis Massey, rather than on behalf of any adversely affected secondary, and neutral employers.

evidenced by the letter and notice heretofore quoted, footnotes (2) and (3), *supra*. In fact, the Superintendent of the Texas Dental Clinic construction job, Louis Gamache, clearly showed his understanding from the Union business agent, Word, that the picketing was aimed solely at the Otis Massey craftsmen, as revealed by his testimony herewith quoted in the margin.[15] The work stoppages by the employees of neutral employers here complained of occurred only on January 27th and 29th, whereupon the union admittedly took the precaution of adding the "See our pamphlet" notation to its picket signs, which pamphlet expressly limited the picketing to Massey, and after which only the Otis Massey employees honored the picket lines. Furthermore, it is practically without dispute that the pickets appeared after the men had begun work, and located themselves as close as possible to the place where the Otis Massey craftsmen were engaged in the normal business of that company. See Moore Dry Dock Co. case, *supra*. Under such circumstances, we conclude that the Board's order, based on the finding that such activity had an unlawful, secondary object proscribed by the

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[15] "Q. What was your conversation with Mr. Word? How did it start?

"A. I went over and asked Mr. Word if the men would be involved on account of the picket line. He said no, it was strictly against Otis Massey and wouldn't involve the men.

"Q. When you say 'the men', what do you mean?

"A. All workmen on the job.

"Q. Did you ask him anything else?

"A. I said if the insulators went home and quit the job, would he quit picketing the job, and he said he would."

statute, is unenforceable as unsupported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. While the drawing of appropriate inferences as to the unlawfulness of objective and motive in a labor dispute is primarily the province of the Board, there still must be some substantial basis for inferring a wrongful rather than a legitimate motive, which we think does not exist here. *N.L.R.B.* v. *Houston Chronicle Pub. Co.*, 5th Cir., 211 F. 2d 848, 854.

Enforcement Denied.

No. 15305

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, INTERNATONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND M. W. MILLER, TRUSTEE, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, RESPONDENTS,

DECREE

Before: RIVES, Circuit Judge, and DAWKINS and DEVANE, District Judges

By THE COURT:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce

its Order dated July 22, 1954. The Court heard argument of respective counsel on April 18, 1955, and has considered the briefs and the transcript of record filed in this cause. On August 2, 1955 the Court handed down its decision denying enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED, ADJUDGED, AND DECREED that enforcement of the Order of the National Labor Relations Board, dated July 22, 1954, directed against Respondents, General Drivers, Warehousemen and Helpers, Local 968, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and M. W. Miller, Trustee, General Drivers, Warehousemen and Helpers, Local 968 and their officers, agents, successors and assigns, be and it hereby is denied.

Entered: September 20, 1955.

A true copy.

APPENDIX B

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), is as follows:

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process,

transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.

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No. 476

IN THE

Supreme Court of the United States

October Term, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND M. W. MILLER, TRUSTEE, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This reply is filed in behalf of Local Union 968 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and M. W. Miller, its Trustee, these being all the Respondents below.

Opinion Below

The opinion of the court below (Appendix A of Petition) is reported at 225 F. 2d 205. The findings of fact, conclusions of law, and order of the Board (R. 50-61) are reported at 109 NLRB 275.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The 4 strikers were truck driver-warehousemen who worked at their employer's warehouse and also delivered the employer's insulation and other building materials to various construction jobs for installation by other employees of the same employer. This installation of its materials through its own employees was 70% or more of the employer's business. When collective bargaining failed between the employer and Respondent Local 968, as the certified bargaining representative of the 4 employees, they struck and picketed at both ends of their to and fro trucking operations. The unchallenged conclusion of the Court of Appeals, from a review of the whole record, was that the picketing at the construction jobs was directed to, and limited to, the other employees of the same employer appealing to them to make common cause pursuant to their right of concerted activity under Section 7 of the Act. The Board does not claim that there is evidence of an additional objective to appeal to or induce employees of neutral employers to take any action.

The question presented is whether, in the face of this record, the Board could properly declare that the "situs" of the dispute was the warehouse only, at which situs the

picketing was "adequate", and by this criterion, find the picketing at the job sites to be in violation of 8(b)(4)(A) of the Act.

Statutes Involved

In addition to Section 8(b)(4)(A) (set forth in Appendix B of the Petition), Sections 7 and 13 of the Act, 29 U.S.C.A. 157 and 163 (set forth in Appendix A, *infra*, p. 15) are also pertinent to this case.

Statement

In the court below Respondents, invoking both Section 10(e) of the Act,[1] and Section 10(e) of the Administrative Procedure Act,[2] sharply attacked the Board's order and findings on the ground that they are: (1) unsupported by substantial evidence, and (2) contrary to an impressive and convincing record that the challenged picketing had lawful purpose to avail of a statutory right.

Reviewing the entire record, the Court of Appeals concluded: (1) that the record "is significantly devoid of any probative proof in support of the allegation in the complaint that Respondent by 'picketing, * * * orders, instructions, directions, appeals and other means' induced and encouraged employees of neutral employers to strike with unlawful secondary object * * * *" (Appendix A of Petition, p. 28); and (2) "the picketing here enjoined was aimed only at the primary employer * * * *" and "* * * even under the Board's own evidence that concerted activity was solely for the lawful object of picketing only Otis Massey * * * *" (Appendix A of Petition, p. 28).

[1] 29 U. S. C. A., Sec. 160 (e).
[2] 5 U. S. C. A., Sec. 1009(e).

The Court could hardly conclude otherwise. As the Petition shows, every aspect of the picketing was limited to the primary dispute. The pickets appealed only to the other employees of the same employer. The location of the pickets, the wording of the signs, and the supplementary oral and written communications all were true to the primary purpose. (Petition, pp. 5, 6). And in addition to the facts stated in the petition, there were others which the Court below noted.

Seventy per cent or more of the primary employer's business is the installation of materials which it sells (B.A. 6, 18). The Otis Massey craft employees who install the materials seldom go to the warehouse, but generally report driectly to the installation job sites (B.A. 6).

The work of the four striking truck driver-warehousemen is not confined to the warehouse; all of them also deliver building materials to Otis Massey's craft employees at the construction projects (B.A. 20-21). At these job sites, they unload and stack the materials for the craft workers, and also replenish the materials from time to time (B.A. 20).[3] Thus, when they picketed the warehouse and the construction sites where Otis Massey's other employees were working in the normal course of the employer's business (B.A. 36, 47), the strikers were picketing at both terminals of their to and fro trucking work (B.A. 19, 22).

At the job sites, the pickets appeared after the men went to work, never before (B.A. 42, 54), and carefully sta-

[3] Contrary to the Petition's recitation (p. 5) that they "occasionally" delivered materials to the construction projects, the court below found: "The record shows that the truck driver-warehousemen, during the period here material, did make a number of deliveries to the Otis Massey job sites. . . ." which Government counsel conceded at the trial was the regular practice (Appendix A of Petition, p. 27, footnote 13).

tioned themselves as close as possible to the place where Otis Massey was engaged in its normal business (B.A. 36, 46). Not all entrances, only those near Otis Massey's work, were picketed (B.A. 47-48).

Based upon this record, Respondents also attacked the Board's conclusions (if they are fact findings) that: (1) the "situs" of the dispute was limited to the warehouse; and (2) picketing at the warehouse was "adequate."

The court below likewise recognized that the Board could not under the guise of fact finding fix the "situs" of a dispute at only one of a primary employer's numerous business activities and noted that Government counsel conceded at the trial that the truck driver-warehousemen from time to time make deliveries to the job sites during the course of the work by employees of Otis Massey (Appendix A of Petition, p. 27); and the Court further noted on the question of the "adequacy" of the picketing that the record showed that the other employees of Otis Massey almost never went to the warehouse, so that picketing at the warehouse would be virtually futile as to such employees (Appendix A of Petition, p. 27). And in this connection, we point out that the record does not contain any testimony which would support the inference that the picketing at the warehouse was adequate from the standpoint of the union. To the contrary, where only four employees go on strike it is obvious that they can be easily replaced and that the strike would certainly fail unless the other employees of the same employer would come to the assistance of the strikers by declining to do the installation work until the strike was settled.

Reasons for Denial of the Writ

1. The meticulous opinion of the Court of Appeals demonstrates that the position of the Board has no merit as applied to the facts of this case. The denial of enforcement was clearly correct.

The difficulty with the Board's position is that Congress, in enacting Section 8 (b) (4) (A), drew the line in terms of an unlawful *objective*. On the other hand the Board has drawn an entirely different line, namely: a geographical "situs" for the labor dispute and an evaluated "adequacy" of the picketing.

As the record shows, the "situs" here declared by the Board is not only unrealistic in fact and without warrant in the statute, but as here applied it effectively destroys important rights conferred by Section 7 of the statute. As to the "adequacy" concept, it is not only contrary to the facts and unsupported by evidence, but is an excursion by the Board into a field which Congress did not entrust to the Board.

Section 7 of the Labor Management Relations Act of 1947 is a verbatim re-enactment of the original Section 7 of the Wagner Act except only that there is added the right to refrain from the guaranteed concerted activities.[4]

The new Section 8 (b) (4) (A) forbids the inducement or encouragement of strike action by neutral employees "where an object thereof" is to force the neutral employer to cease doing business with any other person.

A new Section 13[5] provides:

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[4] See Appendix A, p. 15, **infra.**

[5] 29 U. S. C. A., Sec. 163.

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

In the four leading cases decided June 4, 1951[6] the Supreme Court has settled that Section 7 rights of concerted activity for mutual aid and protection remain intact as between the *primary* parties to a labor dispute.

> "By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specially provided for' in the Act." *International Rice Mill* case, *supra*, 341 U.S. at 673, 71 S. Ct. at 965.

The word "situs" does not appear in the statute. Nowhere is there "specially provided for" a power in the Board to fix a "situs" at only one location of the primary employer's normal business operations or to insulate a few employees from their co-employees. Section 7 which guarantees the right of "concerted activities for * * * mutual aid or protection" has long been held to include the right to strike and picket in support of economic demands.

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[6] **N.L.R.B. v. International Rice Milling Co.**, 341 U.S. 665, 71 S. Ct. 961, 95 L. Ed. 1277 (1951);
N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951);
International Brotherhood of Electrical Workers, Local 501, AFL v. N.L.R.B., 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 1299 (1951); and
United Brotherhood of Carpenters and Joiners of America, AFL v. N.L.R.B., 341 U.S. 707, 71 S. Ct. 966, 95 L. Ed. 1309 (1951).

N. L. R. B. v. Mackay Radio, etc., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), and *Collins Baking Co. v. N. L. R. B.*, 193 F. 2d 483 (C.A. 5, 1951). Section 7 likewise includes the right of fellow employees of the same employer who are not directly involved in the dispute to join the striking workers, to lend sympathy and support to their cause, and to refuse to cross their picket line. *Carter Carburetor Corp. v. N. L. R. B.*, 140 F. 2d 714, 718 (C.A. 8, 1944); *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (C.A. 2, 1942); and *West Coast Casket Co.*, 97 N. L. R. B. 820, 823. Therefore, the strikers had a statutory right to appeal, by picketing, to the other employees of Otis Massey to aid the strike by declining to do the employer's installation work until the bargaining issues should be settled.

Therefore, where the unchallenged conclusions of fact by the Court of Appeals show that the complained-of picketing was limited in fact to Section 7 primary activities, and where there is a total absence of any evidence that there existed the unlawful objective described in Section 8(b)(4)(A), the application of the situs theory is the destruction of Section 7 rights which is not "specifically provided for" as required by Section 13. The Court of Appeals was, therefore, precisely correct when it held (Appendix A of Petition, p. 25-27) that a violation of 8 (b) (4) must be based:

> " . . . upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be *effectually supplanted* merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' pub-

licized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute. . . .

* * *

" . . . we conclude that no warrant exists either in the language of the statute or the authorities cited which would justify the adoption and approval of its 'situs' theory to an extent inconsistent with other provisions of the Act, or for empowering the Board, under guise of fact-finding, to fix the 'situs' of a dispute at only one of a primary employer's numerous business activities, thereby isolating other employees of that same primary employer from exercising their statutory right under Section 7 to engage in mutual aid and protection and make common cause with their co-workers. See *Carter Carburetor Corp. v. N. L. R. B.*, 8th Cir., 140 F. 2d 714, 718; *N. L. R. B. v. Peter C. K. Swiss Choc. Co.*, 2nd Cir., 130 F. 2d 503, 505; *N. L. R. B. v. J. I. Case Co., etc.*, 8th Cir., 198 F. 2d 919, 922." (Emphasis Added; Footnotes Omitted)

The statutory test of unlawfulness is the objective under Section 8 (b) (4) (A) which prohibits the inducement of employees of neutral employers to strike "where an object thereof" is to force the neutral employer to cease doing business with any other person. Perhaps the most often repeated Supreme Court summary of this section has been the reference to this objective:

"At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott some one else." *Denver* case, *supra*, 741 U.S. at 687, 71 S. Ct. at 951.

"We now reach the merits. They require a study of the objectives of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in § 8(b)(4)(A)." *Denver* case, *supra*, 341 U.S. at 685, 71 S. Ct. at 950.

"We must first determine whether the strike in this case had a proscribed object." *Denver* case, 341 U.S. at 687, 71 S. Ct. at 951.

". . . 'It was the *objective* of the union's secondary activities . . . and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision. . . .'" *Electrical Workers* case, 341 U.S. at 704, 71 S. Ct. at 959.

"It is the objective of union encouragement that is proscribed by that section, rather than the means adopted to make it felt." *International Rice Mill* case, 341 U.S. at 672, 71 S. Ct. at 965.

Accordingly, it is clear that the significance of the Board's position in this case is to destroy the ultimate and controlling statutory inquiry and supplant it by the "situs" definition to an extent which is inconsistent with Sections 7 and 13 of the Act. Under the Board's theory the strikers are automatically condemned in advance to the loss of an important segment of their Section 7 rights. For under this theory it does not matter how innocent or lawful may be their purpose and objective nor how true may be their picketing to

their purpose; if they do not conform to the location decreed by the Board, they are *ipso facto* in violation of 8(b)(4)(A). And contrary to the statutory scheme, the parties' freedom to pursue their Section 7 rights is restricted by the Board's notion of what is "adequate" in their economic contest. We submit that the Court of Appeals was indeed duty bound to deny enforcement of this order.

2. In accordance with the Supreme Court's observation in an earlier secondary boycott case that "the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to [redacted]". *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951), the court below citing that case (Appendix to Petition, p. 24) acknowledged the Board's "commendable effort to balance 'the dual Congressional objectives of preserving the right of labor organizations to bring pressures to bear on offending employers in primary disputes and of shielding unoffending employers and others from pressures in controversies not their own' " by devising in the *Moore Dry Dock Company* case, 92 NLRB 547, 549, "certain evidentiary tests to aid in determining the ultimate issue of whether common situs picketing is primary and lawful or secondary and unlawful."

And the court below emphasized that " . . . our view does not compel rejection of all the *Moore Dry Dock* criteria, as such, when properly applied . . ." (Appendix to Petition, p. 26). The Court's holding is limited to a rejection of the situs theory where it was applied "to an extent inconsistent with other provisions of the Act", thereby destroying Section 7 rights. In essence the Court declined to accept the Board's definition of "situs" as a substitute for a clear and convincing record that the prohibited secondary object was

not present. In other words the Board's mechanical approach led to a conclusion obviously at war with truth and fact." "That the picketing here enjoined was aimed only at the primary employer, Otis Massey, and wholly without the proscribed secondary object, could hardly be disputed under this record." (Appendix to Petition, p. 28.)

3. The decision below is in harmony with the view of the other Courts of Appeals which have dealt with the problem. While the Second Circuit referred to the *Moore Dry Dock* criteria as "a sound interpretation of the Act" in *N. L. R. B. v. Service Trade Chauffeurs, etc., Local 145*, 191 F. 2d 65 (C.A. 2, 1951) the language of that court clearly indicates that it would decide the present case in exactly the same way.

In remanding that case to the Board, the Second Circuit noted the legality of primary picketing "conducted at a place *where the primary employer does business* (Emphasis added), "and accordingly the Court found an 8(b)(4) violation because of picketing at a warehouse where "no trucks operated by the primary employer were present at the warehouse, *nor were any of its employees there engaged in the primary employer's business* (Emphasis added.)"

And in *Piezonki d/b/a Stover Steel Service v. N. L. R. B.*, 219 F. 2d 879, 882-3 (C.A. 4, 1955) the Fourth Circuit found an 8(b)(4) violation because "the picketing did not disclose clearly that the dispute was with the primary employer", the Court at the same time indicating that there would be no violation if the picketing were "directed at obtaining relief from the person picketed" as is the case here.

The same is true of *N. L. R. B. v. Chauffeurs, etc., Local No. 135*, 212 F. 2d 216, 219 (C.A. 7, 1954) and *N. L. R. B.*

v. Local Union 55, Carpenters, 218 F. 2d 226 (C.A. 10, 1954); in both of which cases the courts indicated clearly that picketing properly confined to the lawful primary purpose would not violate 8(b)(4)(A).

Thus, all of the courts which have considered the problem have come to the same harmonious conclusion which is in keeping with the statutory scheme and the Supreme Court's pronouncements.

Although the Board may be striving to balance the dual Congressional objectives "in a practical manner", there is no substantial basis in the statute for the Board to claim the right to obscure plain facts and amputate valuable and needed statutory rights in the interest of a mechanical rule which goes awry of the truth and fact of this case. Nor is there merit to a possible latent feeling that Section 7 rights may properly be sacrificed in the interest of "practical" balancing because Congress has established the public policy in another way. "For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed process to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner v. Teamsters Union,* 74 S. Ct. 161, 346 U.S. 485, 499, 98 L. Ed. 228 (1954).

WHEREFORE, Respondents pray that the Petition for Certiorari be denied.

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Certificate of Service

Copies of the foregoing reply have been deposited in a United States mail box, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and to Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C.

CHRIS DIXIE

APPENDIX A

Section 7 of the National Labor Relations Act, as amended, 29 U. S. C. A., Section 157 is reproduced below. The new language added in 1947 is italicized. The remainder is the same as the same section of the Wagner Act:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*"

Section 13 of the National Labor Relations Act, as amended, 29 U. S. C. A. 163, reads as follows:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."